84-839

NO. _____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

RALPH KEMP, WARDEN,
Petitioner,

v.

EDDIE SPRAGGINS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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32pp

QUESTION PRESENTED

1.

Did the Eleventh Circuit Court of Appeals fail to properly follow the holding of this Court in *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052 (1984) by failing to determine that the allegation of ineffective assistance of counsel did not result in prejudice to the Respondent?

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Statute Cited:

28 U.S.C. § 1254(1) 2

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that a writ of certiorari issue to review the judgment of the Eleventh Circuit Court of Appeals entered on November 14, 1983 and the denial of a timely motion for rehearing on September 28, 1984.

OPINIONS BELOW

The Eleventh Circuit Court of Appeals entered its opinion on November 14, 1983, granting habeas corpus relief based on a finding of ineffective assistance of counsel. A copy of said opinion is included in the Appendix to this petition and is reported as *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 14, 1983. *See Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983). A timely suggestion for rehearing was filed, but denied by the court on September 28, 1984. This petition for certiorari has been filed within the allowable ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Eddie Spraggins, Respondent in this Court, Appellee in the Circuit Court and Petitioner in the District Court, was indicted along with co-defendant Freddie Davis during the February Term, 1977 of the Meriwether County Grand Jury for the murder and rape of Frances Coe. Following a jury trial beginning on March 1, 1977, in which Respondent was tried separately from Davis,

Respondent was found guilty on both counts and was sentenced to the death penalty for the murder conviction and to life imprisonment for rape. On direct appeal to the Supreme Court of Georgia, the court affirmed the convictions and the life sentence for rape, but reversed the death sentence on the murder count. The Supreme Court of Georgia found that the jurors at the trial had not been adequately instructed during the sentencing phase. *Spraggins v. State*, 240 Ga. 759, 243 S.E.2d 20 (1978).

A new sentencing trial was held beginning on May 22, 1978. The jury was presented with substantially the same evidence that had been presented at the first trial. Respondent was again sentenced to death for the murder of Ms. Coe. On February 6, 1979, the Supreme Court of Georgia affirmed the death sentence. *Spraggins v. State*, 243 Ga. 73, 252 S.E.2d 620 (1979). On May 27, 1979, this Court granted certiorari, vacated the affirmance of the death penalty by the Supreme Court of Georgia and remanded the case for further review in light of *Godfrey v. Georgia*, 446 U.S. 420 (1980). On remand the Supreme Court of Georgia again affirmed the death sentence and this Court subsequently denied certiorari and rehearing. *Spraggins v. State*, 246 Ga. 432, 281 S.E.2d 828 (1980), *cert. denied*, 451 U.S. 910, *rehearing denied*, 452 U.S. 932 (1981).

Respondent filed an application for state habeas corpus relief on July 30, 1981, in the Superior Court of Butts County, Georgia. That court denied relief on January 4, 1982. The Supreme Court of Georgia subsequently denied an application for a certificate of probable cause to appeal on February 17, 1982. This Court denied the petition for a writ of certiorari on October 12, 1982. *Spraggins v. Zant*, ___ U.S. ___, 102 S.Ct. 239 (1982).

Respondent then filed a petition for habeas corpus

relief in the United States District Court for the Northern District of Georgia. An evidentiary hearing was held by that court on March 28, 1983. On April 8, 1983, the district court issued an order concluding that Respondent received ineffective assistance of counsel at his trial and granted relief vacating the convictions and sentences for both offenses.

Petitioner Francis then filed a notice of appeal to the Eleventh Circuit Court of Appeals. After receiving briefs and hearing argument, that court affirmed the decision by the district court on November 14, 1983 and denied rehearing on September 28, 1984. *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983). The instant petition for a writ of certiorari is filed by the Petitioner challenging the decision by the Eleventh Circuit Court of Appeals.

REASON FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI IN LIGHT OF THE RECENT DECISION BY THIS COURT IN *STRICKLAND V. WASHINGTON* SO THAT THE APPROPRIATE STANDARD MIGHT BE APPLIED IN EVALUATING THE EFFECTIVENESS OF TRIAL COUNSEL AND SO THAT AN APPROPRIATE PREJUDICE ANALYSIS COULD BE APPLIED TO THE PERFORMANCE OF TRIAL COUNSEL IN THE INSTANT CASE.

Respondent Spraggins challenged the effectiveness of his trial counsel in the district court and persuaded the court that counsel was ineffective in his closing argument at the guilt-innocence phase. The Eleventh Circuit Court of Appeals also concluded that counsel was ineffective in the argument that was made at that phase of the trial.

The decision by the Eleventh Circuit Court of Appeals was entered prior to the decision by this Court in *Strickland v. Washington*, ____ U.S. ____, 104 S.Ct. 2052 (1984). Petitioner Kemp sought rehearing in that court asserting that there was a procedural waiver as to the issue in question and also specifically asserting that the argument by counsel was not ineffective and was not prejudicial. After the petition for rehearing was filed, but before its denial, the decision of this Court was handed down in *Strickland v. Washington*. The Eleventh Circuit Court of Appeals subsequently denied rehearing without opinion.

The thrust of the decision by the Eleventh Circuit Court of Appeals was a conclusion that counsel rendered ineffective assistance by virtue of his closing argument at the guilt-innocence phase in which he essentially conceded his client's guilt. The court concluded that this did not amount to a reasonable trial strategy and that counsel failed to provide meaningful advocacy on the issue of guilt.

Respondent submits that an evaluation of the performance of counsel at trial shows that counsel acted as a reasonably professional advocate on his client's behalf throughout trial. Counsel was faced with a client who could provide him with no defense other than simply stating he did not remember committing the crimes. Counsel did not actually have an insanity defense per se but hoped to present his client as a person who was mentally retarded and easily led into situations. Counsel essentially recognized that he had no defense at the guilt-innocence phase of the trial and was hoping to lay a foundation for the sentencing phase. Although counsel did state that he thought his client probably committed the crime in question, he argued that essentially his client

was mentally retarded and not responsible for his actions. A review of the evidence presented at trial shows that there was simply no other argument to be made on his client's behalf. The evidence of guilt was so overwhelming that counsel had no actual defense to present.

In assessing this allegation under the standards set forth in *Strickland v. Washington*, Petitioner asserts that, contrary to the finding of the Eleventh Circuit Court of Appeals, counsel's assistance was not "so defective as to require reversal of a conviction or death sentence . . . ." *Strickland v. Washington, supra*, 104 S.Ct. at 2064. There has been no showing that any alleged errors by counsel were so serious that counsel was not actually functioning as the counsel guaranteed by the Sixth Amendment. Furthermore, there has clearly been no showing that any alleged errors were so serious as to deprive the Respondent of a fair trial. The argument by counsel, even if erroneous, was not such as to justify a finding "that the conviction or death sentence resulted in a breakdown in the adversary process that renders the result unreliable." *Id.* In making the deferential analysis of counsel's performance that is required, it is necessary to reconstruct the circumstances surrounding the conduct of counsel at trial and to evaluate his conduct from the perspective that counsel had at that time. The reasonableness of the actions must be judged in light of the facts of the particular case, which in this case show an overwhelming amount of evidence pointing to guilt.

Even if the actions of counsel are found to be ineffective, it must be shown that the performance was prejudicial to the defense before the granting of relief is justified. Petitioner asserts that no such showing has been made in the instant case. It must be shown that any particular

errors, even if they were unreasonable, "actually had an adverse effect on the defense." *Id.* 2067. As noted by this Court, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 2068. When challenging a conviction the question then becomes "whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 2069.

In evaluating the conduct of counsel in the instant case in light of the above standard, it is clear that even if counsel had not made the argument in question, the jury would not have had a reasonable doubt respecting guilt. The evidence was overwhelming and counsel simply had no other evidence to present on behalf of his client. The mere fact that counsel may have stated that his client committed the crime while mentally retarded was not such that it affected the outcome of the proceedings. The removal of this argument would not have created a reasonable doubt for the jury. An evaluation of the evidence presented at trial clearly shows that it was overwhelming in favor of guilt and that the jury simply had no choice but to return a verdict of guilty. Thus, Petitioner asserts that the prejudice standard in the instant case simply has not been met and the Eleventh Circuit Court of Appeals erred in granting the writ based on the alleged ineffectiveness of trial counsel.

CONCLUSION

For all of the above and foregoing reasons, Petitioner requests that this Court grant a writ of certiorari to review the decision by the Eleventh Circuit Court of Appeals as it is specifically contrary to the holding of this Court in *Strickland v. Washington, supra.*

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MARY BETH WESTMORELAND, counsel of record for the Petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served three copies of the foregoing Petition for a Writ of Certiorari upon the Respondent by depositing three copies of same in the United States mail with sufficient first class postage affixed thereto, addressed to:

Michael McIntyre
200 Peachtree-Trinity Building
175 Trinity Avenue, S.W.
Atlanta, Georgia 30303

This 21st day of November, 1984.

/s/
MARY BETH WESTMORELAND
Assistant Attorney General

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA NEWNAN DIVISION

EDDIE SPRAGGINS V. ROBERT FRANCIS	CIVIL ACTION NO. C82-167N

ORDER

The above-styled habeas corpus petition is brought pursuant to the provisions of 28 U.S.C. § 2254. Petitioner was convicted of murder and rape after a jury trial held in the Superior Court of Meriwether County, Georgia in March, 1977. Petitioner was sentenced to death for the murder and was given a life sentence for rape. On appeal, the Supreme Court of Georgia affirmed his convictions for murder and rape, but vacated the sentence of death on the ground that the jury had not been adequately instructed regarding the imposition of the death penalty. *Spraggins v. State*, 240 Ga. 759 (1978). A second sentencing trial was held in the Meriwether County Superior Court in May, 1978 and petitioner was again sentenced to death by a jury. This sentence was affirmed by the Georgia Supreme Court. *Spraggins v. State*, 243 Ga. 673 (1979). A petition for certiorari was granted by the United States Supreme Court which vacated the sentence of death and remanded the case to the Supreme Court of Georgia for further consideration in light of *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Spraggins v. Georgia*, 446 U.S. 961 (1980). Subsequent to the remand, the Supreme Court of Georgia reaffirmed the judgment imposing the death penalty, *Spraggins v. State*, 246 Ga. 432 (1980), and

a petition for certiorari was denied by the United States Supreme Court, Justices Marshall and Brennan dissenting. *Spraggins v. Georgia*, 451 U.S. 921 (1981). Petitioner then filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia, which was denied on January 4, 1982. The Georgia Supreme Court thereafter denied an application for a certificate of probable cause to appeal the judgment of the Superior Court of Butts County by order dated February 17, 1982.

While counsel for petitioner has raised numerous issues in support of the instant petition for habeas corpus, the court finds that it need only address the issue of whether petitioner was denied effective assistance of counsel at the guilt/innocence trial held in March, 1977. As this constitutional claim was properly raised in Spraggins' state habeas petition, the court concludes that the cause and prejudice standard of *Wainwright v. Sykes*, 433 U.S. 72 (1977), is inapplicable as to this claim, even though petitioner has raised additional grounds before this court in support of his claim of ineffective assistance. Specifically, in the instant habeas petition, it is alleged that Spraggins' trial counsel failed to present a coherent defense in that while petitioner denied at trial any involvement in the offenses committed, counsel admitted petitioner's involvement in the offenses in his closing argument. While this particular ground was not specifically raised in the state habeas proceeding, the transcript of the March, 1977 trial was previously before the state habeas judge who made a finding, in his order denying relief, that trial counsel had made a closing argument, citing to the relevant portion of the trial transcript. Because it appeared to this court in reviewing the same transcript that several of defense counsel's statements during closing argument at the guilt/innocence phase of the

trial may have been prejudicial to petitioner, a limited evidentiary hearing on the matter was held on March 28, 1983 in accordance with 28 U.S.C. § 2254(d)(3). During this hearing, respondent was afforded an opportunity to explain defense counsel's reasons for the statements he made to the jury during closing argument. The court has considered this additional evidence in reaching its decision in this case.

In the recent case of *Washington v. Strickland*, 693 F.2d 1243 (11th Cir. 1982) (en banc), the Court of Appeals for the Eleventh Circuit made the following observations concerning ineffective assistance of counsel:

> The sixth amendment guarantees to criminal defendants the right to assistance of counsel. A vital corollary to this guarantee is the requirement of *effective* assistance of counsel, that is, counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances. A petitioner who seeks to overturn his conviction on grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence.

Id. at 1250 (citations and footnotes omitted) (emphasis in original). The Court of Appeals also stated that a habeas petitioner must show that counsel's ineffectiveness caused "actual and substantial disadvantage" to the conduct of his defense. *Id.*

In the case at bar, Spraggins took the stand during the guilt/innocence phase of his trial and denied any knowledge of taking part in the crimes he was charged with. Nevertheless, in his closing argument to the jury, Spraggins' trial counsel made the following statements:

> We know the deceased Miss Coe, [sic] was killed and there is no question about that, and I think you have made up your minds about what happened and it is

not necessary for me to go into it. But, what I want to talk to you about is the defendant himself. Now, we have a man here who is mentally retarded. . . . [I]f you've had any experience around this type of people, you know just like I do that they will do what you tell them to. If they are badly retarded, they will commit crimes if they are told to do it. If you hand them a knife and tell them to kill somebody they won't ask any question, they'll do it. That is a characteristic of a retarded person. . . . Really, I think what happened here, I think the man was intoxicated, he was heavily intoxicated, he was on drugs, and he is a retarded man too, and I think he is telling the truth when he says he doesn't remember going in the house. He told me that all the time, but I think he did, from the evidence that the State has put up, I think he went in the house and I think he committed the crime of murder probably, but I think when he went in the house and he put his hands on Miss Coe, I think she started fighting and screaming to get away from him, which is a natural reaction, and when she did this, he being drunk and having this mental condition, being on drugs too, he just went all to pieces and he doesn't know what he did. That often times happens when you are dealing with people who are in that condition. Their actions and emotions are unpredictable. . . . I'm not telling you to turn him loose. I'd like to see him in the penitentiary for the rest of his life because I know that he could have done this to a member of my family. He could have done it to a member of your family or anybody else and what we should have done was taken some kind of precaution a long time ago when his family, not knowing how to get it done, and tried for years and years and never have been able to get it done and of course, it was climaxed in this awful tragedy, when this awful tragedy occurred.

Although the state habeas judge concluded that Spraggins received constitutionally adequate assistance of counsel at trial, this is no bar to a reexamination of the

issue by this court. *West v. Louisiana*, 478 F.2d 1026, 1031-32 (5th Cir. 1973), *panel opinion aff'd and adhered to in relevant part*, 510 F.2d 363 (5th Cir. 1975) (en banc). Having reviewed defense counsel's performance as a whole during trial and his closing argument in its entirety, the court concludes that petitioner received ineffective assistance of counsel when his trial counsel conceded petitioner's guilt as to murder at the guilt/innocence phase of his trial and concentrated on a line of argument more properly directed to the penalty phase of the trial. A careful reading of counsel's brief final argument reveals the absence of any meaningful argument on petitioner's behalf regarding the murder charge against him. The court concludes that counsel's ineffectiveness caused actual and substantial disadvantage to petitioner's defense, since his argument, in effect, requested the jury to find that the petitioner was guilty of murder. Accordingly, petitioner's convictions and sentences are vacated and set aside, and the case remanded to the Meriwether County Superior Court for new trial as to all issues, guilty/innocence and penalty, within 180 days of the date of this order, failing which petitioner shall stand acquitted, unless this court grants, for good cause shown, an additional period of time in which to retry petitioner.

SO ORDERED, this 8 day of April, 1983.

/s/ G. ERNST TIDWELL

G. ERNST TIDWELL
JUDGE, UNITED STATES DISTRICT COURT

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-8338

ROBERT FRANCIS, Warden, Georgia Diagnostic and Classification Center,

Petitioner,

v.

EDDIE SPRAGGINS,

Respondent.

Appeal from the United States District Court for the Northern District of Georgia

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(November 14, 1983)

Before HILL and KRAVITCH, Circuit Judges, and MORGAN, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

Eddie Spraggins was convicted of murder and rape in a Georgia court and was sentenced to death on the murder conviction. The district court granted his petition for a writ of habeas corpus on the ground that he had been denied the effective assistance of counsel at trial. In this appeal, the state challenges the district court's conclusions (1) that the procedural default doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977), does not bar consideration of Spraggins' ineffective assistance claim and (2) that Spraggins was denied the effective assistance of counsel

as a result of counsel's argument at the close of the guilt/innocence phase of the trial. We agree with the district court that *Wainwright v. Sykes* is inapplicable in this case and that trial counsel's conduct constituted ineffective assistance. Therefore we affirm.

I BACKGROUND

On January 31, 1977, the body of Frances Coe was found in her house in Manchester, Georgia. A subsequent autopsy revealed that loss of blood from multiple stab wounds was the cause of death and that there had been manipulation of the victim's genitals consistent with sexual relations.

Spraggins was found guilty of murder and rape after a jury trial in the Superior Court of Meriwether County, Georgia. He received a sentence of death for the murder and a sentence of life imprisonment for the rape.[1] On direct appeal, the Supreme Court of Georgia affirmed the convictions, but vacated the death sentence on the ground that the jury had not been adequately instructed during the sentencing phase of the trial. *Spraggins v. State*, 240 Ga. 759 (1978). After a second sentencing trial before a jury, Spraggins was again sentenced to death. This death sentence was affirmed by the Georgia Supreme Court. *Spraggins v. State*, 243 Ga. 673 (1979). The United States Supreme Court granted Spraggins' petition for a writ of certiorari, vacated the sentence of death, and remanded the case to the state supreme court for further consideration in light of *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Spraggins v. Georgia*, 446 U.S. 961 (1980). On remand, the Georgia court reaffirmed the death sentence. *Spraggins v. State*, 246 Ga. 432 (1980), *cert. denied*, 451 U.S. 921 (1981). Spraggins unsuccessfully sought state post-conviction relief in the Superior Court of Butts County, Georgia,

and the Georgia Supreme Court denied his application for a certificate of probable cause to appeal. Spraggins' petition for a writ of certiorari was denied by the United States Supreme Court. *Spraggins v. Zant*, U.S. , 102 S.Ct. 239 (1982).

Spraggins then filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Georgia. After an evidentiary hearing, the district court ruled that Spraggins had received ineffective assistance of counsel during the guilt/innocence portion of the trial and vacated the murder and rape convictions. The state appeals.

II PROCEDURAL DEFAULT

The state urges this court to extend the rule of preclusion set forth in *Wainwright v. Sykes*, 433 U.S. 72 (1977), to procedural defaults occurring at the state habeas stage of a proceeding.[2] We need not reach this issue, for we agree with the district court that because Spraggins' ineffective assistance claim was raised in his state habeas petition, there was no procedural default in this case.[3]

In his petition for state post-conviction relief, Spraggins alleged, *inter alia*, that trial counsel had been ineffective. As specific grounds in support of this claim, he listed eleven failings pertaining to counsel's conduct before and during the guilt/innocence phase of the original trial and at the resentencing hearing. However, he did not specifically mention counsel's closing argument at the guilt/innocence phase. In ruling against Spraggins, the state habeas court reviewed the totality of counsel's representation at trial. Citing to the corresponding portion of the trial transcript, the court noted in particular that counsel

had, among other things, made a closing argument at the guilt/innocence phase.[4] Presumably the court not only ascertained the fact that counsel had made a closing argument, but also assessed the contents of that argument. Indeed, to the extent that the making of a closing argument in itself has no independent significance, the only reasonable inference is that the court considered the substance of the argument and concluded, albeit erroneously, that the argument contributed to counsel's effective assistance. On this reasoning, the district court found that the claim in question was raised by Spraggins and decided by the state habeas court.[5] The scope of our review with respect to such a finding of fact is, of course, restricted to determining whether it is "clearly erroneous." *See United States v. Deal*, 678 F.2d 1062, 1065 (11th Cir. 1982).

The state asserts that Spraggins' failure to specify counsel's closing argument as a ground supporting his ineffective assistance claim constitutes a procedural default under the Georgia statutory provision governing the effect of a petitioner's omission of claims from an initial state post-conviction proceeding. Section 9-14-51 of the Georgia Code provides:

> All grounds for relief claimed by petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise require it or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

Ga. Code § 9-14-51 (1982).

Given that Spraggins alleged ineffective assistance with respect to counsel's conduct at trial and the state habeas

court reviewed the particular conduct on which the claim rests, we agree with the district court that Spraggins was not in default of the state procedural rule and hold that the court properly proceeded to the merits of the claim without applying the "cause" and "actual prejudice" standard announced in *Wainwright v. Sykes*. This is not to say that a general allegation of ineffective assistance or a specific allegation of ineffective assistance wholly unrelated to the ground on which the claim ultimately depends will immunize a petitioner from a finding of procedural default. But where the petitioner calls the state court's attention to ineffective assistance problems and the court examines the crucial aspect of counsel's representation, as in this case, the petitioner may relitigate the constitutional claim in federal court.[6]

III INEFFECTIVE ASSISTANCE

Spraggins was represented at both trials and on direct appeal by Vernon Belcher, a court-appointed attorney. For purposes of the present appeal, a single aspect of counsel's representation at the first trial warrants special attention. Belcher conceded his client's guilt in his argument to the jury at the close of the guilt/innocence phase of the trial. Having plead not-guilty, Spraggins had taken the stand and denied any knowledge of participating in the crimes with which he was charged. He had also denied making exculpatory statements to the police. Nevertheless, in addressing the jury, Belcher expressed his belief that his client had committed the murder, and rather than urging acquittal on the ground of insanity, he suggested that his client deserved life imprisonment.[7]

On these facts, the district court concluded that "petitioner received ineffective assistance of counsel when his trial counsel conceded petitioner's guilt as to murder at

the guilt/innocence phase of his trial and concentrated on a line of argument more properly directed to the penalty phase of the trial."[8] While we agree with this conclusion, we observe that Spraggins' ineffective assistance claim presents a mixed question of law and fact to be examined independently by this court. *See Gray v. Lucas*, 677 F.2d 1086, 1107 (5th Cir. 1982), *cert. denied*, U.S. , 103 S.Ct. 1886 (1983).

In *Washington v. Strickland*, 693 F.2d 1243 (5th Cir. Unit B 1982) (en banc), *cert. granted*, U.S. , 103 S.Ct. 2451 (1983), the former Fifth Circuit set out the standard for assessing a claim of ineffective assistance of counsel. The court noted that "[a] petitioner who seeks to overturn his conviction on grounds of ineffective assistance of counsel must prove his entitlement to relief by a preponderance of the evidence," *id.* at 1250 (footnote omitted), and that "a habeas petitioner must show that his counsel's ineffectiveness caused 'actual and substantial disadvantage' to the conduct of his defense," *id.* The court declared, "[t]he sixth amendment guarantees to criminal defendants . . . *effective* assistance of counsel, that is, counsel reasonably likely to render and rendering reasonably effective assistance given the totality of the circumstances." *Id.* (emphasis in original). Although there is a presumption of attorney competence, "[t]his presumption can be rebutted . . . when certain of counsel's actions do not conform to a general pattern of a rationale trial strategy." *Id.* at 1257-58.

Here the state contends that "the argument by Mr. Belcher was a logical strategy decision in light of the evidence and the incriminatory statements made by the appellee. Mr. Belcher attempted to win sympathy from the jury rather than taking a hypocritical point of view"

at the sentencing hearing. Reply Brief for Appellant, p. 5. In his final argument, counsel not only failed to provide meaningful advocacy on the issue of guilt, but actually urged the jury to return a verdict of guilty. At one point, he declared, "I think he went in the house and I think he committed the crime of murder . . . ." Respondent's Exhibit II, vol. III, p. 129. Even a prosecutor may not properly express such a personal opinion as to the defendant's guilt. *See United States v. Morris*, 568 F.2d 396, 401-02 (5th Cir. 1978). Given Spraggins' plea of not-guilty, his denial of involvement in the crime, and the insubstantiality of his insanity defense, we conclude that counsel's conceding his client's guilt was irrational and rendered his assistance at trial ineffective.

Where a capital defendant, by his testimony as well as his plea, seeks a verdict of not guilty, counsel, though faced with strong evidence against his client, may not concede the issue of guilt merely to avoid a somewhat hypocritical presentation during the sentencing phase and thereby maintain his credibility before the jury. Even though an adverse verdict would have the effect of precluding further argument on the issue of guilt, counsel does not have license to anticipate that effect and to concede the issue during the guilt/innocence phase simply because an adverse verdict appears likely. As the Sixth Circuit reasoned in a similar case, counsel's complete concession of the defendant's guilt nullifies his right to have the issue of his guilt or innocence presented to the jury as an adversarial issue and therefore constitutes ineffective assistance. *See Wiley v. Sowders*, 647 F.2d 642, 650 (6th Cir.), *cert. denied*, 454 U.S. 1091 (1981).

Our conclusion is consistent with that in *Young v. Zant*, 677 F.2d 792 (11th Cir. 1982). There we held that the defendant received ineffective assistance where counsel

adopted the insanity defense without support, ignored obvious defenses, and conceded the guilt of his client in the mistaken belief that such an action was strategically necessary in order to make a strong plea for mercy. While there is no assertion that Belcher ignored defenses to the charges or that he, like counsel in *Young*, was unaware that the murder charge would be tried under a bifurcated procedure, the situation in *Young* is fundamentally similar to the one now presented.[9] Although counsel at a capital trial may take steps to evoke jury sympathy prior to the sentencing hearing, again "we can discern *no* possible reason for [conceding the defendant's guilt] under the present bifurcated procedure." *Id.* at 799 (emphasis in original).

Because Spraggins' guilt or innocence was the only issue to be decided at the earlier phase of the trial and was obviously critical, we also conclude that "counsel's ineffectiveness caused 'actual and substantial disadvantage' to the conduct of [Spraggins'] defense." *Washington*, 693 F.2d at 1250. Hence we agree with the district court that Spraggins was deprived of his sixth amendment right to the effective assistance of counsel at trial and hold that the court properly granted habeas relief.

For the foregoing reasons, the order of the district court granting Spraggins' petition for a writ of habeas corpus is AFFIRMED.

FOOTNOTES

[1] Spraggins' co-defendant, Freddie Davis, was tried separately and was similarly convicted and sentenced.

[2] The state concedes that Spraggins has fully exhausted state remedies with respect to all of his claims. *See* Record on Appeal, p. 210; Brief for Appellant, pp. 13-14. According to the state, those claims contained in Spraggins' original federal habeas petition were raised in state court, while those added in his amended petition—including ineffective assistance arising from counsel's closing argument at the guilt/innocence phase of the trial—were not raised at trial, on direct appeal, or in the state habeas petition, and therefore have been forfeited under Georgia law. Because a federal habeas petitioner is required to exhaust only *available* state remedies, the state asserts, both sets of claims have been exhausted. We agree that the exhaustion requirement poses no obstacle to Spraggins' federal habeas petition, but for a different reason. Since, as we conclude *infra* at [ ], the ineffective assistance claim was raised in Spraggins' state habeas petition and decided by the state court, state remedies with respect to the claim have been exhausted literally, *i.e.*, in the sense that Spraggins has pursued his claim in the state court system, not in the sense that the remedies are foreclosed by a state procedural rule.

[3] Accordingly, we do not decide whether the procedural default doctrine of *Wainwright v. Sykes* applies with respect to state procedural rules governing state habeas petitions so as to bar consideration by a federal habeas court of claims previously omitted from a state petition. We note that the extension of the doctrine to this type of case would be unprecedented in our decisions and in those of the Supreme Court, and would raise serious policy questions perhaps best left to Congress, *see Autry v. Estelle*, U.S. , 52 U.S.L.W. 3293 (U.S., White, Circuit Justice, Oct. 5, 1983). Nevertheless, we hold only that the doctrine, even if applicable generally, would not be triggered in this particular case.

We also decline to decide whether the state may invoke the procedural default doctrine absent a prior state court ruling that the claim at issue has been forfeited under the applicable state procedural rule and may not be litigated in state court. We note, however, our reluctance to speculate in a given case that the state courts would be unwilling to consider the merits of the petitioner's constitutional claim, rather than posing the issue directly to the state courts.

[4] *See Spraggins v. Zant*, No. 5195 (Super. Ct. Ga. Jan. 4, 1982) (order denying petition for writ of habeas corpus), p.4.

[5] *See Spraggins v. Francis*, No. C82-167N (N.D. Ga. Apr. 8, 1983) (order granting petition for writ of habeas corpus), p.5.

[6] Our holding is supported by the new Fifth Circuit's recent opinion in *Vela v. Estelle*, 708 F.2d 954 (5th Cir., 1983). Before the state courts, the petitioner in that case had raised a general ineffective assistance claim, highlighting a number of trial errors on counsel's part. Reasserting his ineffective assistance claim in the federal courts, the petitioner underscored additional trial errors. Noting that "all of these errors support the same constitutional claim urged before the state court, and all were readily discernable from the review of the entire record which that court was obligated to carry," *id.* at 960, the court concluded that for exhaustion purposes, the additional grounds for the general claims had been fairly presented to the state courts. On similar reasoning, we hold that Spraggins' allegations were fairly presented to the state courts for procedural default purposes.

[7] Among Belcher's statements in his final argument to the jury are the following:

> We know the deceased, Ms. Coe, was killed and there is no question about that. And I think you have made up your minds about what happened and it is not necessary for me to go into it. But, what I want to talk to you about is the defendant himself. Now, we have a man here who is mentally retarded. . . . [I]f you've had any experience around this type of people, you know just like I do that they will do what you tell them to. If they are badly retarded, they will commit crimes if they are told to do so. If you hand them a knife and tell them to kill somebody they won't ask any questions, they'll do it. This is a characteristic of a retarded person. . . . If he was sane, as you are, there won't be very much a question in my mind, because there is no reason in the world for this thing to happen. There is no justification for it. You would think I was crazy if I tried to come up here and bring some excuse for it happening. It's just something that should not have happened, but when you are dealing with feebleminded people, people that are retarded, they're on drugs, and they're drinking to excess, then these things will probably happen. . . . Really, I think what happened here, I think the man was intoxicated, he was heavily intoxicated, he was on drugs, and he is a retarded man too, and I think he is telling the truth when he says he doesn't remember going in the house. He told me that all the time, but I think he did, from the evidence that the State has put up, I think he went in the house and I think he committed the crime of murder probably, but I think when he went in the house and he put his hands on Ms. Coe, I think she started fighting and screaming to get away from him, which is a natural reaction, and when she did this, he being drunk and having this mental condition, being on drugs too, he just went all to pieces and he doesn't know what he did. That often times happens when you are dealing with people in that condition. . . . I'm not telling you to turn him loose. I'd like to see him in the

> penitentiary for the rest of his life because I know that he could have done this to a member of my family. He could have done it to a member of your family or anybody else and what we should have done was taken some kind of precaution a long time ago when his family, not knowing how to get it done, and tried for years and years and never have been able to get it done and of course, it was climaxed in this awful tragedy, when this awful tragedy occurred.

Respondent's Exhibit II, vol. III, pp. 126-30.

[8] *Spraggins v. Francis*, No. C82-167N (N.D. Ga. Apr. 8, 1983) (order granting petition for writ of habeas corpus), p. 5.

[9] We note that Belcher, like counsel in *Young*, asserted the insanity defense without supporting evidence. Our decision, however, is not based upon this aspect of counsel's representation.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 83-8338

ROBERT FRANCIS, Warden,
Petitioner-Appellant,
versus
EDDIE SPRAGGINS,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION FOR REHEARING

(September 28, 1984)

Before HILL and KRAVITCH, Circuit Judges and MORGAN, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ PHYLLIS A. KRAVITCH
United States Circuit Judge